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Symbolic Legislation: An Essentially Political Concept [final draft]

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Abstract
Symbolic legislation commonly has a bad name. In critical sociological studies, it refers to instances of legislation that are to a large extent ineffective and that serve other political and social goals than the goals officially proclaimed. Since the nineties of the last century another concept of symbolic legislation is developed, in particular in Dutch legislation theory. In this more recent and more positive understanding, symbolic legislation is an alternative legislative technique that differs from the traditional top-down approach. The question that is addressed in this chapter, is whether there is a real – in the sense of epistemologically real – difference between the two concepts of symbolic legislation. On what grounds can the allegedly negative and positive concepts be differentiated from each other? Is it possible that one instance of legislation can be classified as symbolic legislation both in the negative sense and in the positive sense? Are they two sides of the same coin or do they constitute mutually exclusive categories? As will be shown, the distinction between the two concepts cannot be made on scientific grounds only, but involves considerations of a political kind.

Keywords: symbolic legislation, efficacy of law, communicative approach, interactive approach, symbolic interactionism, legislative studies, law and politics, political methodology, semiotics, rhetorics.

1 Two concepts of symbolic legislation

Symbolic legislation commonly has a bad name. In critical sociological studies, it refers to instances of legislation that are to a large extent ineffective and that serve other political and social goals than the goals officially proclaimed. A well-known example is the Norwegian 1948 Housemaid Law, studied by Vilhelm Aubert (1966). In Aubert's view, the legislation at hand was never meant to be effective, but was enacted in order to give recognition to the rights of housemaids on an immaterial or 'symbolic' level. It served to demonstrate that these rights were taken seriously, at least on paper. However, in practice nothing much changed in the position of housemaids. European and international environmental regulation and policy have often been analysed in terms of 'symbolic politics', because of the weak enforcement mechanisms it offers (see, for instance, Matten 2003 and Cass 2009). Recently, the Dutch Government has proposed to penalise foreigners who have no legal permit of residence in The Netherlands. According to the criminal law scholar Theo de Roos (2013, 9), this proposal is an example of symbolic legislation 'in the worst sense of the word'. He considers the penalisation of unauthorised residence to be merely symbolic, because it will be very difficult to enforce it and, moreover, it will probably not deter immigrants from coming to the country. As Arnold (1938) and Edelman (1976) have argued, the legal system in general can be seen as a collection of symbols that fulfil a power maintaining and status quo preserving function.

Since the nineties of the last century another concept of symbolic legislation is developed, in particular in Dutch legislation theory (see, e.g., Witteveen 1991 and 2005; Van Klink 1998; Witteveen

and Van Klink 1999; Van der Burg and Brom 2000; and Poort 2013). In this more recent and more positive understanding, symbolic legislation is an alternative legislative technique that differs from the traditional top-down approach. The legislature no longer issues commands backed up with severe sanctions, as in an instrumentalist approach, but provides open and aspirational norms that are meant to change behaviour not by means of threat but indirectly, through debate and social interaction. General clauses, such as 'human dignity', are favoured because they are supposed to make the law more flexible. They are supported by relatively soft enforcement mechanisms which have to stimulate discussion and raise awareness in society. Other labels used for the same legislative approach or similar approaches are 'responsive regulation' (Ayres and Braithwaite 1995), 'communicative legislation' or 'communicative approach' (Van Klink 1998, chapter 3) and 'interactive legislative approach' (Van der Burg and Brom 2000; Poort 2013; and Van der Burg 2014).

The question that I will address in this chapter, is whether there is a real – in the sense of epistemologically real – difference between the two concepts of symbolic legislation. On what grounds can the allegedly negative and positive concepts be differentiated from each other? Is it possible that one instance of legislation can be classified as symbolic legislation both in the negative sense and in the positive sense? Are they two sides of the same coin or do they constitute mutually exclusive categories? As I will argue below, the distinction between the two concepts cannot be made on scientific grounds only, but involves considerations of a political kind. (What 'political' means in this context will be specified below.) So, in the final analysis, I consider symbolic legislation to be a political concept. It is a concept that is used to describe and evaluate political and legal practise, that is, the process of legislation as well as its products. However, the concept can only do its descriptive and evaluative work on the basis of certain political presumptions and ideological choices. As a consequence, symbolic legislation theory does not stand outside legal and political practise and its power struggles, but is an integrative part of this practise. It is my aim to reveal the often hidden political basis or bias underlying the concept of symbolic legislation and the differentiation between the two conceptions thereof.

What I offer here, is an exercise in political methodology based on a *transcendental*, not an empirical or a normative, argumentation. So my question is not: on what empirical grounds can it be established that symbolic legislation 'really' exists nor what is, normatively speaking, the best approach to symbolic legislation, but I want to know primarily what has to be presupposed in political terms, before an empirical or normative theory of symbolic legislation can be developed in the first place. To begin with, I will describe and compare the two different concepts or conceptions of symbolic legislation. In section 2 I will analyse the current 'negative' concept, according to which symbolic legislation is a mere instrument of power used for dubious political purposes. In section 3 I will present an alternative, 'positive' understanding of symbolic legislation, which I have developed in my earlier writings but which I have criticised later.[1] In section 4 I intend to demonstrate subsequently that the two concepts or conceptions of symbolic legislation cannot be distinguished from each other on purely scientific grounds. Finally, in section 5 I will evaluate briefly the two opposing, critical sociological and communicative, approaches to symbolic legislation.

[1] Sections 2 and 3 are based on my PhD thesis (Van Klink 1998, chapters 2 and 3). On some points I have revised and updated the text (following Van Klink 2014). Moreover, I have added some examples from other contributions to this volume.

2 Symbolic legislation 'in the worst sense of the word'

In legal sociology, a specific instance of legislation is usually called 'symbolic', if a law is promulgated primarily to function as a symbol. Symbols are, in semiotic terms, a special kind of connotative signs, that is signs which, beside their literal or conventional meaning, convey another, secondary meaning (or connotation, see Eco 1984, 131-163). An established unit of expression (or *signifier*) and content (or *signified*) which constitutes an 'ordinary' sign, functions as the expression for a new content. One can think of the sign 'sun' which not only has the primary meaning of a celestial body, but which also transfers connotations such as fertility, warmth and recreation. Like other connotative signs, a symbol contains a layered semantic structure. However, the secondary meaning that it conveys is of a more general and indeterminate nature, compared to other, more conventional connotations. There is no code available that may determine or guide the interpretation of the symbol. As Nöth (1990, 119) indicates, symbols represent an 'immaterial content of importance to human life.' In many cases, values of a 'higher', spiritual order are at stake. For example, after his release, Nelson Mandela became a symbol for ideals such as justice, equality and forgiveness. At the same time, the literal meaning does not fully disappear, though it is less dominant: Mandela was also the person who resisted the Apartheid regime, was imprisoned on Robben Island for many years, became president after that and died in 2013 at the blessed age of 95. In due course, these plain facts of his life are moved to the background in favour of the higher values that the former politician symbolises for many people all over the world. A well-known and somewhat worn-out legal symbol is that of Lady Justice, who represents an impartial and fair trial.

When an instance of legislation is conceived as symbolic legislation, the law at hand signifies something else and something more than appears at first sight. By the sheer promulgation of the law, the legislature aims at construing a sign whose meaning transcends the enacted rules (Kindermann 1989, 265). Values are added to it, so that the law acquires 'added value' on a semantic level for some group(s) in society or the whole of society. In the conventional understanding, a law is collection of substantive provisions that prescribe, forbid or permit certain types of behaviour. These substantive provisions are often supported by provisions that have to secure that the rules of behaviour are complied with, for instance by putting a sanction on non-compliance. In case of symbolic legislation this primary or literal layer of meaning is supplemented by a second layer of meaning. Thus, symbolic legislation is characterised, as the symbol as such, by a layered structure of meaning: on the primary or literal layer of meaning, we find the conceptual content of the substantive provisions (rules of behaviour) and the provisions to secure law compliance (that is, rules to enforce these rules of behaviour), whereas the secondary or symbolic layer contains immaterial values that are attached to this conceptual content. The secondary meaning that is attached to symbolic legislation, replaces or overshadows to a large extent the 'surface' or apparent meaning of the law. In order words, the law is not meant to be complied with, but its main purpose is to give expression to values in the political sphere.[2] For that reason the legislature deliberately fails to provide for sufficient means to enforce the law. Moreover, in many cases symbolic legislation consists of vague norms which are unclear and open to multiple interpretations, of even contradictory norms. The meaning that is given to the immaterial values expressed through symbolic legislation can be different for different groups in society and may change over time. As Aalders (1984) has shown, initially the environmentalist movement considered the Dutch Public Nuisance Act ('Hinderwet') to be a moral victory over the

[2] In this context, 'political' refers to the use or abuse of power by state officials for their own sake or their clientele's at the cost of the common good. In section 4, I develop a more general concept of the political (of which 'dirty politics' is just one particular instance).

industry. Eventually, when it became apparent that the Act would remain largely ineffective, it became a symbol of the government's betrayal.

In order to determine whether a particular instance of legislation is symbolic, several criteria are used, taken either from the textual qualities of the law at hand (semantic criteria) or the context in which the legislative process takes place (pragmatic criteria). Semantic criteria are: in a symbolic law, the substantive provisions are not backed up with provisions to enforce them and this discrepancy cannot be justified on rational grounds (*criterion of discrepancy*); the text of the law is incomprehensible for the citizens who have to comply with it as well as for the legal and political actors who have to apply it (*criterion of obscurity*); and the rules of which the law consist can be interpreted in various ways (*criterion of vagueness*). Pragmatic criteria are: in the legislative process two or more groups with conflicting or incompatible interests are fighting each other (criterion of conflict of interest); one of the groups involved considers the enactment of the law as a moral victory over the other group (or groups) and a confirmation of its values (*criterion of politisation*); and society is in a state of emergency that calls for immediate governmental action (*crisis criterion*). If two or more of these criteria are met, it is likely that the law in question serves symbolic rather than instrumental goals.

In contrast to traditional instrumental legislation, symbolic legislation does not aim at enforcing the enacted rules of behaviour (direct effect) ─ especially by means of 'hard and fast' rules backed up with sanctions ─ and at reaching more fundamental goals (indirect effect). Different effects are associated with symbolic legislation, such as changing the status distribution or reconciling antagonistic groups in society, which have nothing to do with this kind of rule compliance and which therefore are called 'independent effects'.[3] Because of their political character, I have coined these effects, which are mainly of an immaterial nature, 'negative-symbolic effects' (Van Klink 1998, 47). Generally speaking, symbolic legislation can be promulgated in order to attain three kinds of negative-symbolic effects: first, the confirmation of the value system defended by a particular group; second, the demonstration or simulation of power on the part of the government; and, third, the resolution of a social conflict between two (or more) groups or political parties. Three types of symbolic legislation correspond to these effects: status, illusionary and compromise legislation respectively (Kindermann 1988, 230-239). Status legislation, to begin with, aims at improving the prestige of a social group. According to Gusfield (1976), the American prohibition legislation from the beginning of the 20th century, constituted an official recognition of the ascetic, Protest morality at the expense of the more hedonistic lifestyle of catholic Irish immigrants. Status legislation has primarily an expressive function: it confirms values that are essential for those involved in the legislative process. This expression of values does not take place for its own sake,[4] but in order to change the status distribution in society. Secondly, by promulgating an illusionary law, the government tries to create the impression that a crisis situation is under control or a (possible) threat to society is averted. The Dutch bill that penalises unauthorised residence in The Netherlands, as discussed in section 1, can be characterised as illusionary legislation, because it probably will not solve the problem of the illegal immigration but it sends out a signal to society that the government does not approve of it. In chapter 14 of this volume, Lee & Stokes argue: 'Legislating to regulate nanomaterials suggests symbolically a capacity to control not just these materials but the prospects to which they will give rise. This may well be illusory, raising the question of what it is we hope for in legislation, especially when that legislation represents a political mêlée in which power is at issue and where regulation may be seen to facilitate dominant political choices in favour of the technology.' In other words, they consider the EU regulation of nanotechnologies primarily to be a simulation of power. An illusionary law can also be used in order

[3] The distinction between direct, indirect and independent effects I have borrowed from Griffiths (1978, 8-12).
[4] As in the case of expressive legislation, see section 3.

to attract votes during an election campaign: just before the elections, the government wants to show that is capable to act and to achieve concrete results. Ad hoc laws that are enacted for the purpose of one particular case only offer another example (Jasiak 2010). Thirdly, in the case of compromise legislation antagonistic groups or parties are reconciled by means of a would-be compromise. In Aubert's classical study (Aubert 1966), the Norwegian 1948 Housemaid Law is presented as a compromise in this sense between two opposing parties in Parliament: a progressive party that wanted to improve the legal position of housemaids on the one hand and a more conservative party that defended the interests of housewives on the other hand. In the same vein, Aalders (1984) analyses the Dutch Public Nuisance Act as a 'peace pipe' that had to pacify members of the environmentalist movement and the industry.

As these examples show, symbolic legislation may very well serve instrumental goals. Therefore, contrary to popular belief, symbolic legislation is not the antithesis to instrumental legislation and does not simply equal non-effective legislation. Symbolic laws do affect social reality, though in different ways than 'ordinary' instrumental laws and in order to achieve different goals, such as the pacification of antagonistic groups, the simulation of power in emergency situations, or the (re)distribution of status in society.

3 Symbolic legislation as a 'communicative framework'

In the nineties of the last century another, positive conception of symbolic legislation was developed, in particular in Dutch legislation theory. [5] It was also meant to offer an alternative to the instrumental regulatory style, though not by way of deceit and power simulation, as in the negative conception, but through communication and interaction. According to this communicative or interactive approach, a law can be called 'symbolic' in the positive sense, if a law has acquired an extraordinary meaning within the legal and political community. The law is not merely a set of rules, but it is also a symbol for something higher, more valuable. It gives expression to values which are fundamental for the community, for example human dignity, equality or environmental protection. Moreover, a law is called 'symbolic' in the positive conception because of the general clauses it contains. Symbolic legislation offers a 'communicative framework'[6] consisting of general viewpoints by means of which people can settle their differences. General clauses function as symbols that are interpreted again and again in the light of new circumstances or changed legal and moral opinions. Since the general clauses which makes up symbolic laws consists embody important moral aspirations, I have called them 'aspirational norms' (Van Klink 1998, 109). Aspirational norms have no fixed meaning and have to be developed in an ongoing interaction between various legal, political and social actors. In symbolic legislation, two different messages are transmitted at the same time: the open, aspirational norm itself (the primary norm) as well as the assignment directed to the interpretative community to apply this norm and make it more concrete (the secondary norm).[7]

In order to identify symbolic legislation in the positive sense several, semantic and pragmatic, criteria have be met. Semantic criteria include the *criterion of openness*, which indicates that the aspirative norms enacted in symbolic legislation offer legal actors (the judge in particular) much, but not complete discretion in interpreting the law; the *criterion of positioning*, according to which the special value of the law can be deduced from the central position the law occupies within the existing hierarchy of norms; and the *criterion of discrepancy*, which holds that in a symbolic law there is a gap

[5] This research project started with the edited volume Witteveen, Van Seters and Van Roermund (1991).
[6] I have borrowed this notion from Minow (1980, 294).
[7] See Allott (1980, 33). Below, the notion of interpretative community will be explained.

between the substantive provisions and the provisions to enforce them, which could not have been easily and reasonably avoided. The rationale behind this approach is that in certain matters, persuasion is a more effective instrument than punishment. The pragmatic criteria are the *communication criterion*: a symbolic law plays an important part in the public debate on the matter regulated by the law; *the criterion of inclusiveness*: the ends the law pursues and the means chosen are widely supported by society; and finally the criterion of *symbolic working*: the law succeeds gradually in achieving the goals intended through communication and interaction. If all of these criteria are met to a greater or a lesser extent, the legislation at hand requires an important symbolic value.

Symbolic legislation in the positive sense fulfils various useful functions in society. One of the most important functions is the epistemic function: a symbolic law offers a vocabulary that affects the way in which legal and political actors perceive reality. Reality is accessed through the concepts and distinctions provided by the law. The anthropological function that Van Beers mentions in her contribution (chapter 11) can be seen as an application of the epistemic function to biolaw: by introducing new categories and distinctions and redefining existing ones, biolaw provides for 'the symbolic mediation of the bare, biological facts of life (*zoè*) into the meaningful events of the lives that we lead (*bios*).' According to De Dijn (chapter 9), '"behind" the law there were and are at least some deep ethical conceptions related to "thick" notions such as responsibility, human dignity, etcetera, themselves incomprehensible without their link to a human life world with its system of symbolic categories and distinctions (e.g., between humans and animals, life and death, family and non-family, etc.).'A symbolic law has also a rhetorical function, which consists of offering a source of arguments. In debates concerning law, these arguments or *topoi* can be used as trumps. Sterckx & Cockbain argue in their contribution (chapter 13) that, through the exchanges between political actors and the courts, European patent law has influenced the public debate. Moreover, a symbolic law constitutes an interpretive community,[8] that is a group of legal and political actors as well as citizens who are involved in the application of the law. This is the so-called constitutive function. The communicative framework that the law offers facilitates mutual understanding among members of the interpretive community. According to Sterckx & Cockbain, European patent law has constituted an interpretative community consisting of, among others, politicians, officials, judges, patentees, patent applicants, opponents and alleged infringers, industry and patent attorney associations, NGO's, academics and also citizens. However, in their view, this community has not succeeded yet in defining key concepts in patent law, such as 'invention'.

By giving voice to essential values of a community, symbolic legislation fulfils an expressive function. In his contribution, Priban (chapter 7) states that the symbolic dimension of legislation, in particular in the context of constitution-making, primarily consists of the expression of social identity: 'Legal symbolism is best understood as the legal system's specific reflection of social expectations of communal togetherness, goodness and justice.' However, he does not believe in 'law's capacity to promote social cohesion by recognising moral values.' Several authors in this volume refer to the expressive function of biolaw. For instance, Herring (chapter 8) argues that biolaw should incorporate a relational concept of the human body: 'We need a legal model that appreciates and promotes this more communal, mutable, interdependent nature of bodies.' In his view, biolaw does not merely serve instrumental goals, but has an important symbolic value as well: 'The legal classification of bodily material is not simply of pragmatic assessment, but says something profound about our understanding of bodies and ourselves.' According to Van Beers (chapter 11), human dignity, 'as one of the central values of biolaw', 'can be understood as a legal-symbolic representation of what it means to be human.' This does not mean that this kind of legislation 'only' represents an expression of values; it

[8] Fish (1980, 171) uses the notion of 'interpretative community' in the context of literature studies and literary criticism. It is applied here to the legal and political sphere.

also aims at affecting social reality.[9] However, the means by which it tries to steers the behaviour of citizens differ fundamentally from the approach chosen in the case of instrumental legislation. Instrumental legislation is based on an autonomous, authoritarian regulatory style: the ruler gives commands to the ruled, which ought to be obeyed unconditionally. The substantive provisions are written in a concrete and unambiguous language and are backed up, in case of non-compliance, by severe sanctions. By contrast, the communicating legislature chooses a less hierarchical and more interactive approach. It introduces abstract and multi-interpretive norms whose content has to be further determined by the members of the interpretive community. Moreover, structures for deliberation are created which stimulate the communication between the executive, the judiciary and the addressees of the law. For instance, in the enforcement of the Dutch Equal Treatment Act a central role is assigned to the Board for Human Rights and Equal Treatment which only has an advisory role in conflicts between two parties in matters of discrimination (see Van Klink 1998, chapter 4). According to Zeegers (see this volume, chapter 15), legislation concerning the use of human embryos in research, implemented in the various European countries, can be seen as symbolic, both in the sense that it recognises the special legal status of human embryos (expressive function) and that it adopts a deliberative and interactive legislative approach.

Three types of symbolic legislation can be distinguished: constitutive legislation, educational legislation and expressive legislation. By means of constitutive legislation the legislature codifies fundamental legal, moral and political values that are shared widely in society. In many cases, written constitutions consist of constitutive legislation of this kind. For instance, in the first article of the German constitution the value of human dignity is codified in order to confirm the sanctity of human life against the atrocities of the Nazi regime (see Lembcke 2013). Furthermore, in constitutive legislation a division of roles is established among the legal and political actors who have to implement and realise these values.[10] Educational legislation is directed at changing mentality.[11] Contrary to constitutive legislation, it has a modifying character: it is introduced in order to de-automatise current patterns of thinking and evaluating and corresponding patterns of behaviour in a non-instrumental way. The effects pursued, which lie in the realms of cognition, language use and attitude, can be called positive-symbolic effects (Van Klink 1998, 47). In comparison to constitutive legislation, education laws are more controversial in society although they are expressive of widely shared ideals. Gender equality legislation offers well-known example: many people will support equality of men and women on a general level, but opinions differ fundamentally regarding the means to be chosen to achieve this – through preferential treatment, gender quota or less intrusive measures. The main purpose of expressive legislation is to give recognition to fundamental values. While this official recognition constitutes a value in itself, it does aims at influencing behaviour. In his study of Dutch embryo legislation, Wibren van der Burg (1996, 80) states: 'Legislation can be (…) an expression of the values that are essential to this society. Through legislation, it communicates those values to its members, expecting that they will take these values as guidelines.'

On a superficial level, symbolic legislation in the positive sense may seem to share some characteristics with its symbolic legislation in the negative sense, with respect to, for instance, the

[9] In his contribution, Hoeyer (chapter 10) also points to the instrumental value of symbolic legislation: '(…) we need to appreciate the constitutive social effects of legal symbols, even when the laws as such do not seem to work as intended.' See also Lembcke's contribution (chapter 6) on this point.

[10] For a more detailed analysis of constitutive legislation, see Witteveen & Van Klink (1999, 130-133).

[11] Cotterrell (1984, 57) uses the notion of 'educational legislation', whereas in Dutch legislation theory it used to be more common to speak of 'mentality legislation'.

phrasing of the norms and the political circumstances in which they are arise.[12] However, they differ in many other respects substantially, in particular regarding the connotative meanings which are transmitted (dubious political aims versus ideals of a high moral standard), the kind of norms used (vague versus open norms) and the effects pursued (negative-symbolic effects such as electoral success versus positive-symbolic effects such as attitude change. Because of these fundamental differences and to avoid misunderstandings, I have proposed to rename 'symbolic legislation in a positive sense' *communicative legislation*, whereas 'symbolic legislation in a negative sense' may simply remain *symbolic legislation* (Van Klink 1998, 90). Van der Burg (2000 and 2005), Van der Burg and Brom (2000) and Poort (2013) prefer to speak of an 'interactive legislative approach,' which promotes on on-going interaction between officials and citizens on all levels of norm creation and application.[13]

A communicative or interactive approach to legislation may possibly conflict with the Rule of Law. General clauses are controversial, because laws have to be precise and clear.[14] Otherwise, the citizens cannot orient themselves to the rules. Moreover, too much power is transferred from the legislature to the administration and the courts. However, in certain circumstances it is inevitable or even desirable to leave the texture of the law open. This is especially the case when, to begin with, the legislature has insufficient technical knowledge to formulate clear and distinct rules (as in environmental or IT legislation); subsequently, the matter in hand is too complex conceptually to be regulated in detail (see the standard reasonableness and fairness in civil law); and, finally, the matter is ethically sensitive and controversial (as is the case with legislation on euthanasia or embryos). If the problems of a technical, conceptual and/or ideological nature are solved gradually after the promulgation of the law, it is possible to make the rules more concrete. Subsequently, it may be argued that in some cases it is desirable to leave the texture of the law open in order to preserve the responsive character of the law. The legislator does not place himself above society, but rather prefers a dialogue. General clauses enable legal and political actors to react flexibly, which does not mean uncritically, to changing opinions concerning law and justice in society.

Finally, openness does not equal vagueness. Whereas general clauses are usually not very helpful, open norms ─ possibly in combination with more concrete rules ─ do guide, to a certain extent, the interpretive activities of the executive and the judiciary. It is then necessary that members of the interpretive community take seriously their collective responsibility to elaborate the given norms 'in the spirit of the law.'[15]

4 The conflict of interpretations

Obviously, 'negative' and 'positive' are not neutral but evaluative terms. They express the normative stance the investigator takes towards the object investigated. The concepts of symbolic legislation in

[12] In hindsight, I consider these resemblances to be less superficial than I did while writing my PhD thesis. Now, I see them as indicative of the political nature of the distinction between the two concepts of symbolic legislation (see section 4).

[13] For a general introduction to the interactive legislative approach, see Poort (2013, chapters 1 and 3) and Van der Burg (2014). See also Van der Burg's contribution to this volume (chapter 3).

[14] According to Fuller (1969, 63), clarity of the law is one of the requirements of good law making. In his view, this does not rule out the possibility of using standards such as 'good faith' and 'due care' in the text of the law: 'Sometimes the best way to achieve clarity is to take advantage of, and to incorporate into the law, common sense standards of judgment that have grown up in the ordinary life outside legislative halls.' However, this does not mean that the legislator can 'always safely delegate his task to the courts or to special administrative tribunals' (Fuller 1969, 64).

[15] On the compatibility between the interactive approach and the requirements of the Rule of Law, see further Van der Burg's contribution (chapter 3).

the negative sense (or, as De Roos put it, 'in the worst sense of the word') and symbolic legislation in the positive sense (conceived as a 'communicative framework') seem to correspond to good and bad legislation respectively. However, things are not that simple. As some scholars have argued, symbolic legislation may serve useful political and social functions. When a society is in serious trouble and the feelings are running high, a would-be compromise or a merely verbal expression of values is sometimes the best or even the only possible way out (see also Lembcke in chapter 6). This is the so-called safety valve function of symbolic legislation. Conversely, symbolic legislation in the positive sense is never presented as a panacea for every social problem. A communicative or interactive approach is advocated only under specific conditions and for specific cases. As indicated above, I have argued that problems of a technical, conceptual or ideological nature may justify the use of general clauses (Van Klink 1998, see section 3). Van der Burg and Brom (2000) and Poort (2013) have designed their interactive legislative approach exclusively for ethically sensitive matters, such as the embryo selection, euthanasia and animal biotechnology. According to some critics (among whom Griffiths 2005), communicative legislation equals bad legislation because it contains too vague norms and does not offer any serious means of enforcement. That does not change the fact though that every characterisation of symbolic legislation is based on, or at least inevitably contains, evaluative considerations; only *the kind of* evaluation may change – from negative to positive, or vice versa –, depending on who evaluates and/or what is evaluated. What exactly is the nature of this evaluation? And how does it make a qualification or disqualification in terms of symbolic legislation possible as well as a differentiation in two concepts or conceptions of symbolic legislation?

In my view, 'symbolic legislation' is an essentially political concept. By implication, I consider the distinction between the two concepts or conceptions of symbolic legislation to be political, as well as the communicative and interactive approaches which have been developed out of some notion of symbolic legislation and/or symbolic effects of legislation. Every symbolic legislation theory, implicitly or explicitly, presupposes some view on where regulative power should be located, how it should be distributed and executed, that is, how legislation should be fabricated and implemented, who has to be involved in the legislative process and in what way, which norms or values deserve legal recognition, and so on. For the purposes of the present analysis, I use the notion of the political in three different, but closely related senses, referring to: (i) a comprehensive normative view on the nature, aim and scope of regulatory power,[16] the division of power within the state (or some other social organisation), the relation between state and society, the values to be protected through regulation and so on (that is, a political philosophy or, in Marxist terms, an ideology); (ii) a political (not necessarily party-political) programme that translates the general and fundamental assumptions and aspirations into a set of specific prescriptions for the execution and division of regulatory power within the social organisation at hand and that identifies the central goals to be achieved; and (iii) a scenario that, on an even more concrete level, assigns to every actor or organisation a specific role in the regulatory process and selects the regulatory instruments (legislation or some other means) in order to achieve the political goals, laid down in the political programme. For instance, the political philosophy of liberalism has, besides freedom, equality as one of its core values (ideology); building on this value, equal treatment of men and woman can be identified as a concrete political goal which the state is expected to guarantee (programme) and which can be achieved by a means of, e.g. setting legal quota on the amount of women in higher positions or through policy instruments like subsidies (scenario).

(a) Symbolic legislation in the positive sense: the communicative and interactive approach

[16] That is, the power in both senses of capacity and competency to create or maintain order within a certain social domain through the use of law or other means.

Generally speaking, exponents of the communicative and interactive approach intend to make the process of law making and implementation more democratic and responsive. In opposition to supposedly traditional and instrumentalist notions of top-down steering in which the ruler issues unilaterally commands to the ruled, they conceptualise regulative power as an interactive, two-way or bottom-up process, in order words, as a matter of interpretation, negotiation and communication. Opinions differ on the exact role and function of the state in its capacity of centralised legislative power. Some scholars consider the legislator to be just one of the many legal and political actors involved in the legislative process, and not necessarily the most important one (cf. Van der Burg 2005 and Poort 2013), whereas other scholars still assign to the legislative power a key role in initiating and co-ordinating the legislative process and eventually in determining and implementing the legal norms (cf. Witteveen and Van Klink 1999).[17] In both cases, the legislature appears to be a benevolent, non-authoritarian instance that responsibly and responsively, in a co-production with its citizens, makes laws and takes care of their implementation. Law and morality are seen as intertwined: though not identical they are necessarily connected, feeding and reinforcing each other like Siamese twins.[18] Ideally, the legal norm development parallels the moral norm development, so that law enforcement may no longer be needed: 'where moral norm development and legal norm development go hand in hand, actors working with legal rules in the field are likely to be in conformity with the new legal rules before these rules are enforced at all' (Poort 2013, 12). The values which are studied and, implicitly or explicitly, supported within a communicative and interactive approach are mostly of a social liberal kind, for instance equality of men and women, equal treatment of gay people, good labour conditions, and animal protection (see Van Klink 1998; Van der Burg 2005; Azimi 2007; and Poort 2013 respectively). However, since these progressive values have to be realised in a communicative and interactive way, one can never be sure that the law at hand is implemented in a good manner, that is, in accordance with the social liberal ideology. So there is a possible tension (which is not further theorised) between the adherence to certain substantive political values on the one hand and the formal ideal of democracy on other hand, which is taken to prescribe that the realisation of these values have to be outsourced, from the legislature to the courts or to society in general. Within the communicative and interactive approach not much attention is paid to the dimension of violence which is a necessary part of every legislative act (not everyone can participate in the legislative process, not every voice can be heard and recognised).[19] The attempt to depolitise political power has, of course, important political effects: it gives scientific approval to a specific way of law making and to the laws that are made that way and, thereby, it confirms and reinforces the given legal and political order. The existing power structure is studied from an internal perspective and constructive suggestions are made for improving its functioning, building on mainstream social liberal values.

(b) Symbolic legislation in the negative sense: the critical sociological approach

Legal sociologists who have studied symbolic legislation in the negative sense (such as Arnold 1938, Edelman 1976 and Gusfield 1976) or have criticised the positive conception of symbolic legislation (Griffiths 2005, Stamhuis 2005 and others) take, on the other hand, in general an external and very critical perspective towards the state and the status quo. In their view, the legislature is not so much a communicator or facilitator but a manipulator of symbols. By officially recognising certain legal norms, it wants to transmit the message that the state is still in control or that it takes seriously a certain value, morality or group in society (such as the protestant morality in case of the temperance

[17] This point is also discussed in the introduction (chapter 1, section 2).

[18] This metaphor is introduced in Van der Burg and Ippel (1994). On the relation between law and morality from an interactive perspective, see also Van der Burg (2003).

[19] See also the introduction (chapter 1, section 2).

legislation in the US). However, because the state does not provide for any serious means of enforcement, the overt message is distrusted and reinterpreted as a sign of unwillingness or inability to change anything substantial in the current situation. Law and morality may be connected (though not necessarily), but this connection is perceived from a political perspective, that is as one that is established for political purposes only or predominantly. Political action is unmasked as a theatre play to which citizens are doomed to remain spectators. This semiotic strategy of debunking has a delegitimising effect on state power: the legislative process and its products are exposed as mere signifiers of 'dirty politics.' As a consequence, the given legal and political order is not confirmed and reinforced, as in the communicative and interactive approach, but is fundamentally called into question. The exact political agenda of these critical sociological studies is not always clear, but it may be related to various ideological positions, ranging from a radical progressive position that is disappointed by the failure to achieve social change (as in Aubert 1966) and the lack of any real participation by the people in the political process (for instance, Edelman 1976 and 1988) to a more conservative or even anti-political (but therefore no less political) position that distrusts political power *tout court* and dismisses any appeal to social change as make-believe (as in Arnold 1938).

In order to differentiate between the two concepts or conceptions of symbolic legislation, it does not suffice to refer merely to scientific and 'objective' data. Significantly, there are striking similarities between the criteria used in identifying symbolic legislation in the two different, negative and positive, senses. In both cases, legislation has to be made under socially and politically very difficult circumstances, in particular when the ethical convictions in society differ fundamentally and a widely held compromise seems unattainable. Subsequently, the clauses used – whether they are characterised as 'open' or 'vague' norms – are of very general nature and in desperate need of interpretation. Finally, there is a discrepancy or mismatch between the substantive provisions in the law and the provisions to enforce them. In both cases, value expression is a value in itself and seems to be more important than the law's actual enforcement, at least for the time being. These 'bare' facts only – difficult circumstances, general clauses, and weak law enforcement – are not enough to carry out an analysis in terms of symbolic legislation, either in the negative or in the positive sense. What is needed in addition is an appreciation or evaluation of these facts from a specific political or ideological point of view. If one takes the external, critical sociological position of distrust and suspicion, one sees dubious political motives at work everywhere and an unwillingness or inability to change the existing state of affairs in any fundamental way. If one is prepared, on the contrary, to put on one's pair of rose-coloured glasses and approach the phenomena internally from an interactionist or communicative perspective, one might see interesting opportunities for debate and interaction and chances for moral and legal norm development. Suddenly, a value expression through legislation no longer serves political purposes but has an 'inherent value', or at least it is an important step in the right direction. The communicative and interactive approach is idealistic in the double sense of focusing on ideals (the world wished for instead of the world as it is) as well as on effects at the immaterial level of thought and speech, whereas critical sociological studies of symbolic legislation (and symbolic politics in general) are more 'down to earth' and demand 'real', immediate and material results. In very rough terms, one could say that the two approaches can be distinguished by means of the opposition between *Idealpolitik* and *Realpolitik*.

5 The politics of symbolic legislation theory

It is not my intention now to take sides in this 'conflict of interpretations',[20] though I am ready to admit that I still have more sympathy for the communicative and interactive approach, despite its political naivety and its methodological and conceptual flaws. Critical sociological studies of symbolic legislation are very entertaining reading material, if you enjoy myths debunked (as I do). These studies have drawn attention to effects of legislation that are often neglected in traditional impact studies. Furthermore, they may serve a useful political purpose in criticising political power and demanding more tangible results. However, critical sociological studies in this branch can be very sweeping and tend to overstate their case. They reduce politics to a theatre play.[21] Although there are undeniably theatrical aspects to politics, there is more to the political than mere theatre. If one is prepared to take an internal perspective to the legislative process – which I consider to be a pre-scientific, political choice –, one can see that, at least in well-functioning states, legislation mostly serves various functions and may have various effects, both of an instrumental and a symbolic kind. Law is never entirely symbolic or entirely instrumental, but a dynamic and unstable mixture of both.[22] Critical sociological studies focus exclusively or predominantly on negative-symbolic effects of legislation (power simulation, changes in status distribution, pacification of antagonistic groups, and so on), thereby ignoring or downplaying possible positive-symbolic effects on speech and thought that are essential for the working of the law (see Schwitters 2005). What is lacking, in short, is a feeling for the complex hermeneutic processes that necessarily accompany the fabrication and implementation of the law. Furthermore, in most cases no serious, practical or normative, alternative to the legislation dismissed as symbolic is offered. To be critical is one thing, but to make constructive suggestions for improving the current situation is something else.

On the other hand, the communicative and interactive approach may be accused of confusing factual and normative statements, of misrepresenting the inevitably hierarchical relation between state and society, and of ignoring elements of power and violence in the law. I agree with all that.[23] It definitively lacks the playfulness and the critical attitude that characterises many of the critical sociological studies mentioned above. At the same time, I still believe it is worthwhile to think about legislation in a normative way and to look for possibilities to enhance the democratic quality of the law and its responsiveness, while recognising the necessary limitations thereof – not everyone can participate in the legislative process, not every viewpoint can acquire official recognition. Moreover, I think that the law's contribution to the symbolic order – its influence on thought, speech and attitude formation – deserves more attention than it usually gets.

What I wanted to show here primarily, is that the scientific debate on symbolic legislation is no neutral affair, but a scholar has to take a normative stance in political and ideological matters concerning the role and function of the state, the relation between state and society, the values to be supported and the way to support them, before s/he can apply the conceptual and methodological tools, offered by the two opposing approaches, for describing and evaluating symbolic legislation or, more generally, symbolic effects of legislation. I would welcome it if both approaches would be more explicit about the political implications of their theories of symbolic legislation.

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[20] The phrase is taken from Ricœur's famous book title (Ricœur 1974).

[21] Edelman (1988) frequently speaks of politics as a 'spectacle' in which citizens are assigned the role of mere spectators.

[22] Jellinek already pointed out that law not only serves an instrumental function by establishing order, but it also possesses a symbolic dimension in that it gives expression to the self-understanding of a given society. In its symbolic dimension law has, according to Jellinek, an orientational function (see Lembcke and Van Klink, forthcoming). Van der Burg (2005) also argues that legislation in general serves both functions.

[23] In Van Klink (2005 and 2014) I provide a more extended evaluation of the communicative and interactive approach.

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